



**FAILURE TO TIMELY ASSERT “FAILURE TO EXHAUST”
MEANS FAILURE FOR YOUR ARGUMENT:
The United States Supreme Court Rules That the “Failure to Exhaust Administrative
Remedies” Defense Is Not Jurisdictional and Can Be Waived**

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In a unanimous decision authored by Justice Ruth Bader Ginsberg, the United States Supreme Court decided that Title VII’s charge-filing precondition to suit is a claim-processing rule, not a jurisdictional one, and therefore can be waived if not timely raised.¹

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. It also prohibits retaliation against those who assert rights under the statute. Before bringing an action in court, a plaintiff must first file a charge with the Equal Employment Opportunity Commission (EEOC). However, the EEOC does not adjudicate claims. Instead, it notifies the employer and investigates the allegations. If the EEOC finds “reasonable cause” to believe that the allegations in the charge are true, it endeavors to eliminate the alleged unlawful employment practice, including having the first option to bring a civil action against the employer in court. If the EEOC finds no reasonable cause, it dismisses the charge and notifies the plaintiff of the right to sue in court.

Regardless of whether the EEOC acts on the charge, a plaintiff is entitled to a notice of the right to sue within 180 days of filing the charge. If the plaintiff wishes to pursue a claim against the employer in court, the plaintiff must do so within 90 days of receiving that notice.

In the case before the United States Supreme Court, Lois Davis worked in information technology for Ford Bend County. Davis complained of sexual harassment and allegedly suffered retaliation because of her complaint. Davis submitted an intake questionnaire with the EEOC² and then filed a charge.

While Davis’s charge was pending, her employer asked her to report to work on an upcoming Sunday. Davis advised her employer that she had a commitment at church that day, and she offered to find another employee to replace her at work. Davis’s employer demanded that she report to work on Sunday or face termination. When Davis went to church, not work, her employer terminated her employment.

¹ Fort Bend County v. Davis, 587 U.S. _____ (June 3, 2019).

² Davis filed her documents with the Texas Workforce Commission and they were relayed to the EEOC pursuant to a worksharing agreement between the two agencies.

In an attempt to update her EEOC documents, Davis handwrote “religion” on her intake questionnaire and checked boxes on that form for “discharge” and “reasonable accommodation.” She did not update her charge.

After receiving a right to sue notice, Davis filed a lawsuit against Fort Bend County in federal court, alleging religion-based discrimination and retaliation for reporting sexual harassment. After years of litigation, only the religion-based discrimination claim remained in the case. Ford Bend County then asserted, for the first time, that the court lacked jurisdiction because Davis’s charge did not assert a claim for religion-based discrimination.

The lower court granted Fort Bend County’s motion to dismiss, finding that the “failure to exhaust administrative remedies” defense was jurisdictional and, therefore, could be raised at any time. The Court of Appeals for the Fifth Circuit reversed, finding that the defense is a prudential prerequisite to suit and Ford Bend County forfeited it by waiting too long to raise it.

The United States Supreme Court affirmed the decision of the Fifth Circuit, holding that Title VII’s charge-filing requirement is not jurisdictional and, therefore, could be forfeited if not timely raised.

The Court noted that the word “jurisdictional” is generally reserved for prescriptions identifying the class of cases a court may entertain (subject-matter jurisdiction) and the persons over whom a court may exercise authority (personal jurisdiction). Prerequisites to suit, like Title VII’s charge-filing requirement, are not of that character.

The Court also pointed to the location of the charge-filing requirement within Title VII in support of its conclusion. The requirement is stated in provisions that are discrete from the statutory provisions empowering federal courts to exercise jurisdictions over Title VII claims.

As a non-jurisdictional claim-processing rule, Title VII’s charge-filing requirement can be waived if not timely asserted. So what is considered timely? Hopefully, courts in the near future will interpret the Supreme Court’s decision and give employers guidance on exactly when a “failure to exhaust” defense must be asserted. Until then, employers should raise the defense as early as possible to avoid forfeiting it.

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